IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Civil Suit No.56 of 2003.

Judgment reserved on: 10.11.2006.

Date of decision: 20th November, 2006.

Sh.Vikram Mehra ….Plaintiff

-Versus-

Saras Poly Pack Pvt.Ltd. and others ….Defendants

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting? No

For the Plaintiff: Mr.Sunit Goel, Advocate.

For the Defendants: Ms.Uma Manta, counsel for R-1&2.
Mr.Rakesh Manta, counsel for R-3.

Deepak Gupta, J.

This suit has been filed by the plaintiff for recovery of Rs.14 lakhs from the defendants.

Admitted facts are that the plaintiff Vikram Mehra entered into an agreement with defendant No.2 Y.L. Dhawan who was the Managing Director of defendant No.1 Saras Poly Pack Pvt. Ltd. on 21st March, 2003 whereby the defendants No.1&2 agreed to sell plots No.43, 44 and 45, Sector 5, Parwanoo, Tehsil Kasauli, District Solan, H.P. to the plaintiff for a total consideration of Rs.59 lakhs. A sum of Rs.5 lakhs was paid as earnest money on 21.3.2003 itself. The agreement contained a stipulation that out of the balance amount of Rs.54 lakhs, Rs.30 lakhs would be paid to the seller on or before 20.4.2003.

Clause 5 of the agreement originally provided that the balance of Rs.24 lakhs would be paid by the purchaser to the seller on or before 20th April, 2003 subject to clearance/no dues certificate being obtained by the seller from various authorities and the Union Bank, Chawri Bazar, New Delhi.

Clause 11 of the agreement provided that copies of the no dues certificate shall be handed over to the purchaser upto 30th April, 2003. Clause 12 provided that the last date for completion of the bargain was on or before 20th May, 2003.

It is further the admitted case of the parties that by mutual consent certain amendments were made in the agreement on 18th April, 2003 which were incorporated in the agreement by making cuttings and over-writing in the agreement. In clause 3 the time for payment of Rs.30 lakhs was changed to 20.5.2003 instead of 20.4.2003. In clause 4 the words "20th May, 2003" were changed to "30th May, 2003" and in Clause 12 the last date for completion of bargain was changed from 20th May, 2003 to 30th May, 2003.

The relevant Clauses of the agreement are 3,4,5,11 & 12 which read as follows:

> "3.That the said purchaser will pay balance amount of Rs.54,00,000/- (Rs.Fifty Four Lacs only) at the time of transfer the plot in Himachal Pradesh Housing Board. Further agreed between the parties that the said purchaser will give a part payment of Rs.30,00,000/- (Rs. Thirty lacs only) to the said seller on or before 20.4.2003 (20.5.2003 after correction on 18th April 2003) against the seller Bank Loan/Dues.

4.That the said seller shall pay all amounts found due against the said Industry plot to the Govt. concerned authorities upto 20th May, 2003 (30th after correction on 18th April, 2003).

5.That the balance of Rs.24,00,000/- (Rs.Twenty Four Lacs only) will be paid by the said purchaser to said seller on or before 20th May, 2003. Subject to the clearances/ No dues from Govt. of H.P., Electrical & Water Department, local bodies & Union Bank, Branch, Chowri Bazar New Delhi etc. taken by the seller to said purchaser.

11.That the seller will pay all dues upto 30th April, 2003 and after that any dues regarding this will be paid by the purchaser. Copies of no dues certificate are to be handed over to the purchaser upto 30th April, 2003.

12.That the last date for the completion of this bargain is on or before 20th May, 2003 (30th after correction on 18th April, 2003)"

Now coming to the disputed facts. According to the plaintiff in addition to the amount of Rs.5 lakhs he had paid another sum of Rs.1,70,000/- to defendant No.3 on 18.4.2003 on the request of defendant No.2. Therefore, according to the plaintiff he has paid a sum of Rs.6.70 lakhs in all. The plaintiff alleges that the deal could not fructify due to the fact that the defendants 1&2 backed out of the deal and therefore the plaintiff in terms of Clause 14 of the agreement is entitled to get back double of the amount paid by him to the seller. The plaintiff alleges that the defendant did not get any no objection certificate from the Union Bank of India and once the time for completing the agreement had expired the plaintiff became entitled to recover the amount. The plaintiff has also claimed interest on this amount @ 18% p.a. and has restricted his claim as on date of filing of the suit to Rs.14 lakhs. The plaintiff also alleged

that he had entered into the agreement acting for and on behalf of M/s.Imperial Auto Industrials Ltd. and this fact was not disclosed at the time of entering into the agreement to maintain business secrecy.

The defendants 1&2 admit the agreement but according to them the agreement could not reach its logical conclusion due to the fact that the plaintiff did not comply with the terms and conditions of the agreement. According to the defendants since the plaintiff himself did not pay a sum of Rs.30 lakhs by 20th of May, 2003 there was delay in obtaining no objection certificate from the Union Bank of India. Briefly the case of the defendants is that in case the plaintiff had paid the defendants 1&2 a sum of Rs.30 lakhs they would have paid the same to the bank and would have entered into a settlement with the bank. According to the defendants it is because of the non payment of this amount that the no objection could not be obtained from the bank by the stipulated date. The defendants have also denied the fact that any amount of Rs.1.70 lakhs were paid to defendant No.3 or that it was paid at the behest of defendants 1&2. The defendants have also challenged the locus standi of the plaintiff to file the suit since plaintiff himself states that he had been set up as a benami purchaser to purchase the property on behalf of M/s.Imperial Auto Industries Ltd.

On the pleadings of the parties this Court framed the following issues:

> "1.Whether the plaintiff has paid part consideration of Rs.6.70,000/- in terms of agreement for the purpose of purchasing the property subject matter of the suit?OPP.

2.Whether the defendants have failed to perform their part of the agreement?OPP

3.whether the agreement in question was validly rescinded by the plaintiff, as alleged?OPP.

4.Whether the plaintiff is entitled to the amount claimed by him?OPP.

5.Whether the plaintiff has no locus standi to file the present suit?OPD

6.Whether the suit for the payment of the part consideration paid by the plaintiff is not competent and maintainable?OPD

7.Whether the plaintiff has failed to perform his part of contract by not making payment of rupees thirty lacs within the stipulated period?OPD

8.whether time was essence of the contract, if so to what effect?OPD.

9.Whether the suit is bad for misjoinder and non-joinder of necessary parties?OPD.

10.Whether the plaintiff has not approached the court with clean hands and is guilty of suppression of material facts?OPD

11.Whether this court has no jurisdiction to try the suit?OPD.

12.Whether the suit is liable to be dismissed under Sections 35 and 35-A of the Code of Civil Procedure? OPD.

13.Relief."

Both the parties led evidence. My issue-wise findings are as follows:

ISSUE NO.1:

There is no denial of the fact that the plaintiff has paid and the defendants 1&2 did receive a sum of Rs.5 lakhs as earnest money. The only dispute is with regard to the amount of Rs.1.70 lakhs allegedly paid by the plaintiff to defendant No.3 Ish Kapoor

purportedly at the behest of the plaintiff. The plaintiff appeared as PW-2 and in his statement has stated that at the request of defendant No.2 he had given a sum of Rs.1,70,000/- to defendant No.3 on 18th April, 2003. In cross examination he admits that he had not obtained any receipt of Rs.1.70 lakhs . He also admits that he cannot produce any document to support his assertion that Rs.1.70 lakhs was paid to defendant No.3. PW-3 S.B.Sardana , Managing Director of Imperial Auto Industries has stated that Rs.1.70 lakhs was paid to defendant No.3 who was stated to be a property dealer in his presence. He has also stated that no receipt was issued with regard to the payment of Rs.1.70 lakhs. According to him defendant No.2 was present when this payment was made.

Defendant No.2 appeared as DW-4 and he has denied that he had ever instructed the plaintiff to pay any amount to defendant No.3. According to him defendant No.3 was in fact introduced to him by the plaintiff. This is the entire evidence on the issue.

It cannot be believed that any person would pay a sum of Rs.1.70 lakhs in a commercial transaction without obtaining receipt for the said amount. Admittedly on 18th April, 2003 certain amendments/corrections were made in the original agreement which were initialled by the parties. If an amount of Rs.1.70 lakhs had been paid on that date there is no reason why this fact should not have been incorporated in the agreement. Admittedly Ish Kapoor defendant No.3 is a property broker. Without going into the question whether he was previously known to the plaintiff or the defendants 1&2, why would the plaintiff pay him Rs.1.70 lakhs and not obtain a

receipt. There were no reasons for the defendants to ask the plaintiff to pay such an amount to the broker. In any event there is no proof of the fact that this payment was made by the plaintiff at the behest of defendant No.2. Even PW-3 who claims that the payment was made in his presence does not say so. Therefore, this issue is decided by holding that the plaintiff had paid only Rs.5 lakhs in terms of the agreement for the purpose of purchase of the property.

ISSUES 2, 3 & 7:

These issues go to the core of the matter and can be decided together since the evidence to be discussed with regard to all these issues is common and the material question to be decided is that which of the parties failed to comply with the terms and conditions of the agreement dated 21.3.2003 and who is responsible for the failure of the agreement to be taken to its logical conclusion.

I have already set out the admitted and disputed facts in the opening part of the judgment. A perusal of the agreement between the parties dated 21.3.2003 which has been exhibited as Ext.PW-2/A shows that the plaintiff was aware that the property was mortgaged with the Union Bank, Chawri Bazar, New Delhi. The introductory part of the agreement contains a writing to the effect "the said property will be free from mortgage on or before 20.5.2003". When the parties entered into the agreement it is apparent that the intention was that out of the total balance sale consideration of Rs.54 lakhs the plaintiff would pay Rs.30 lakhs by 20.4.2003 "against seller bank loan/dues". Thereafter Rs.24 lakhs was to be paid on or before 20th May, 2003 and no objection was to be obtained from the Union

Bank. Defendants have led evidence by examining defendants 1,2 and 3 to show that all the dues of the HPSEB, H.P. Housing Board and the Municipal council Parwanoo had been paid on or before 8th April, 2003 well before the originally stipulated date of 20.4.2003. The only dispute is with regard to the dues of the Union Bank.

On the date when the agreement was entered the defendants 1&2 owed a huge amount to the bank. The case of the defendants as set out by the defendant No.2 while appearing as DW-4 is that in case the plaintiff had paid to the defendants 1&2 Rs.30 lakhs on or before 20.5.2003 he would have paid that amount to the bank and entered into a settlement with the bank and would have been in a position to pay the balance amount to the bank after the balance amount of Rs.24 lakhs were paid. On the other hand the case of the plaintiff simply is that since the defendants did not obtain no objection from the bank by 20th May, 2003 the agreement came to an end and the plaintiff was not bound by the same. The plaintiff has proved Ext.PW-2/B a letter sent by him to the defendant on 26.5.2003. Interestingly in this letter the plaintiff alleges that a sum of Rs.7.50 lakhs had been paid as advance whereas even in the present suit the allegation is that only Rs.6.70 lakhs had been paid in advance. This letter was replied to by the defendants 1&2 on 5th June, 2003 in which it is mentioned that all the NOCs except the NOC from Union Bank of India had been obtained and it has also mentioned that efforts are being made to get NOC from the bank and the same would be obtained between 15th to 18th June, positively. The plaintiff admits that he received this letter but did not respond to

the same. The plaintiff also admits that the defendants sent him a copy of the settlement arrived at between the bank and the defendants 1&2 on 23.6.2003 by fax. As per the terms of this compromise the Union Bank agreed to accept a sum of Rs.66 lakhs as one time settlement from defendants 1&2. The fact that this fax was sent by defendants to the plaintiff who did not reply to the same indicates that the parties still thought that the agreement was to be enforced. It was only on 10.10.2003 that the plaintiff sent a letter to the defendant No.2 asking for refund of Rs.13.40 lakhs. Thereafter, notice Ext.PW-2/D was sent by the plaintiff on 28.10.2003 which was duly replied to by the defendants 1&2 through their counsel vide reply dated 7.11.2003 Ext.PW-2/F.

After going through the entire record and the evidence led by the parties, I am of the considered opinion that it was the plaintiff who was at fault. It appears that while making the amendments to the agreement on 18th April, 2003 though the time was extended in clauses 3,4 and 12 but no amendment was made in clauses 5 and 11. Un-amended clause 11 when read with amended clauses 3,4 and 12 makes no sense whatsoever. It also appears that the date 20th May, 2003 in clause 5 remained unchanged inadvertently. The intention of the parties was very clear that a sum of Rs.30 lakhs were first to be paid to the bank and thereafter a no objection certificate was to be obtained from the bank and the sale deed executed and the balance amount paid. The plaintiff is now taking to the advantage of the fact that on 18th April, 2003 the date in clause 5 was not changed. Though the plaintiff sent the letter dated 26th May, 2003 Ext.PW-2/B

he did not send any letter to the defendants 1&2 rescinding the contract. He admittedly chose not to reply to the letter dated 5th June, 2003 PW-2/C sent by defendant No.2 wherein he was informed that the defendants 1&2 are making efforts to have the matter settled with the bank. The matter was settled with the bank vide Ext.D-1 on 23.6.2003. A copy of the settlement was sent to the plaintiff by fax. Still the plaintiff chose to remain silent till 10.10.2003. Therefore, I am of the opinion that the plaintiff has failed to prove that it was the defendants who failed to perform their part of the agreement. The fault was that of the plaintiff who did not advance a sum of Rs.30 lakhs which were to be used to partly pay off the dues of the bank so that the matter could be settled with the bank. Therefore, I decide Issues 2&3 against the plaintiff and issue No.7 in favour of the defendants.

ISSUE NO.4:

The agreement Ext.PW-2/A contains clause 14 which reads as follows:

> "14.That if the seller backs out from this bargain then he will pay double the amount of total received money to the said purchaser. If the purchaser backs out of the deal, the earnest money will be forfeited. The purchaser has a right to accept the said damages or to get the sale/transfer effected through Court of law under the specific relief Act, at the cost and risk of the said seller."

Since I have held that it was the plaintiff purchaser who backed out from the deal the defendants are entitled to forfeit the earnest money. This issue is decided against the plaintiff.

ISSUE NO.5:

The argument of Ms.Manta is that the plaintiff himself admits that he had entered into the agreement acting for and on behalf of M/s.Auto Imperial Ltd. and therefore he had no locus standi to file the suit. No doubt these averments have been made in the plaint and the plaintiff while appearing as PW-3 has stated this in the evidence also. However, the agreement was entered into by the plaintiff and there was a clause that the plaintiff could assign his rights to any other person. It cannot be said that the plaintiff has no locus standi to file the suit. This issue is decided against the defendants.

ISSUES No.6,8,9,10,11&12:

These issues are not pressed and hence decided against the defendants.

In view of the above discussion the suit of the plaintiff is dismissed with costs.

November 20, 2006. **(Deepak Gupta),**
PV **Judge**